Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1993

In re James T. Kouno

PETITION FOR WRIT OF MANDAMUS TO
JUSTICES OF THE SUPREME COURT OF
THE STATE OF OREGON AND TO
THE SUPREME COURT

PETITION FOR WRIT OF MANDAMUS

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James T. Kouno, petitioner herein, petitions the Court to issue a writ of mandamus, directed to the Justices of the Supreme Court of the State of Oregon and to the Supreme Court, and shows as follows:

QUESTIONS PRESENTED

Under the 1st Amendment religion and redress of grievances clauses, Article I, Section 10(1) titles of nobility and contracts clauses, 7th Amendment trial by jury clause, and 14the Amendment due process and equal protection clauses of the U. S. Constitution, and under state constitutional guarantee of jury trial in all civil actions at law the amount in controversy wherein exceeds $200,

(1) Whether the teacher-student and the school-student relationships in the state university, in the parties' formally academic conduct with each other, are purely private contractual, rather than

being matters of civic laws of the state.

(2) Where the state university student has sued in state court the university purely in its private academic capacity as university, and the teachers purely in their private academic individual or private academic representative capacity as teacher at the university, and sued only them, only in cntract or in tort arising in contract, for their *secular* wrongs in their formally academic conduct with him, whether the state court constitutes a state agency charged with the supplying of the due process of law to the student, by its adjudication of the case in the terms requested by the student.

(3) Whether, in the above law suit, the state court may, without an act of a jury, dismiss the action for failure to state claim, without the defendants ever appearing in the capacities wherein they

are sued?

(4) Where the student has alleged that defendant university and teachers promised him, in their academic conduct with him to act without fail on their (sovereign private) academic conviction or integrity in his behalf, and that the defendants did not so act, but without cause and with malice, with intent to escape from their contract obligations knowingly of their existence and to disregard dire effects of their disregard to the student, whether the allegation constitutes a contract claim as well as a tort claim, either claim justifying non-economic and punitive damages?

(5) Where the defendant university or teachers have raised as their defense their state sovereign administrative or quasi-judicial privileges or immunities, and on that defense secured decisions favorable to them in state court at all

its levels, whether the state court may now deny the student's motion for a final judgment on the pleadings for an order of default.

(6) Where the State Board of Higher Education and lawyers from the state Department of Justice appeared in the defendants' behalf, and, acknowledging the purely schoolish substance of the law suit and the capacities wherein the defendants are sued, joined the defendants and pleaded in defense of the latter the latter's state sovereign administrative or quasi-judicial privileges or immunities, whether the intervenor state agencies and agents are liable in state court for the wrongs of the defendants, and for interference with the student's liberty and property interests in his contractual relationship in court with the defendants, under Section 1983, title 42, United States Code, and under state stat-

ute permitting tort actions against the state and its agencies and agents.

(7) Where the student has raised in his petition to the state supreme court for review questions of law which are not moot, whether the state supreme court may deny the petition. In particular, whether the court may refuse to answer a question of timeliness of claims of tort arising in contract as tort claims.

PARTIES

The petitioner in this mandamus action is James T. Kouno, a state university student and unsuccessful plaintiff, appellant and petitioner for state supreme court review in his pure contract action against his teachers and university for their formally academic conduct with him.

The respondents in this mandamus action are the Justices of the Supreme Court of the State of Oregon: the Honor-

able Wallace P. Carson, Jr., Chief Justice, Edwin J. Peterson, W. Michael Gillette, George A. Van Hoomissen, Edward N. Fadeley, Richard L. Unis, and the Honorable Susan P. Graber, in their individual and official capacities, and the Supreme Court.

The other parties to the litigation in respect of which relief is herein sought are the defendants: Oregon State University, as corporation in its private academic capacity as university, and Kenneth L. Beals, Courtland L. Smith, Lyle D. Calvin, Tom E. Grigsby, Lloyd E. Crisp and John V. Byrne, in their private individual and private representative capacities as teacher at Oregon State University.

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1. OPINIONS BELOW

The Order of the Oregon supreme court denying Kouno's petition for review is replicated in Appendix, at App-1.

The Order of the Oregon supreme court denying Kouno's petition for reconsideration is replicated at App-2.

The Judgment of the Oregon court of appeals affirming the trial court is replicated at App-4.

The Order of the Circuit Court for the 21st Judicial District of the State of Oregon, granting the defendants' motion for summary judgment against Kouno's contract action is replicated at App-6.

The Circuit Court's letter opinion incorporated in the Order by reference is unreported, and is replicated at App-8.

In 1990, this Court denied Kouno's petition (No. 89-1708) for a writ of certiorari to the Court of Appeals for the 9th Circuit, *Kouno v. Oregon State Board*

of Higher Education, 111 S Ct 539 (1990), after requesting the Oregon solicitor general's office to respond to the petition. In the petition Kouno maintained that the federal court's diversity jurisdiction should extend to the case underlying herein. For the state Ms. Janet A. Metcalf, assistant attorney general, ably argued among other things that the state university teacher is a state agent in his formally academic conduct, in academic freedom, with his student.

Kouno's principal points and citations of laws in the Petition, his Reply to the state, and his Petition for Reconsideration, were same as in this Petition. But, Kouno, even more than today, groping at that time for legal notions and expressions, his language was not as plain as today. Easily imaginably to him the language was not sufficiently pursuasive for purposes of the petition which,

after all, did not raise the issues in their ultimate ripeness and simplicity. (Kouno is mortified about the poor copy quality of the Reply).

There has not been any opinion by any court or governmental agency other than those indicated above and those, indicated below, issued by OSBHE and state lawyers in defense of the state university and teachers in the litigation underlying herein.

2. GROUNDS OF JURISDICTION

The Oregon supreme court's order denying review of the court of appeals' affirmance of the trial court's summary judgment against Kouno's contract action was entered on August 24, 1993. The supreme court's order denying reconsideration was entered on October 26, 1993. This petition was filed and served on Monday, January 24, 1994, by U.S. (registered) mail, under Rules 29.2 and 29.3 of

this Court, and should be automatically timely under Rules 13.1 and 13.4 of this Court.

In the contract case the state court refused to take jurisdiction over the defendants in the capacities wherein they were sued, or refused to take jurisdiction over the contract dispute, in misapprehension purely of law, inimically to the U. S. constitutional provisions enumerated at page (1), and particularly to the contracts and the trial by jury clauses.

This Court's appellate jurisdiction over the state supreme court in this case is founded on Section 1257, Title 28, United States Code.

This Court's mandamus jurisdiction over the state courts is founded on Section 1651(a), Title 28, United States Code. *Gordon v. Longest* 41 US 97, 16 Pet 97, 10 L Ed 900 (1842); *In re Dowd*, 133 F

747, 751 (1904).

This Court's mandamus jurisdiction over this case is founded on *Ex parte First National Bank*, 288 U S 516, 33 S Ct 591, 57 L Ed 946 (1913); *Ex parte Connaway*, 178 U S 421, 20 S Ct 951, 44 L Ed 1134 (1900); *Ex parte Morgan*, 114 U S 174, 5 S Ct 825, 29 L Ed 135 (1885).

The true functionality, rather than figureheadness, of the state supreme court Justices and the supreme court, and the propriety of their respondentship herein, are underlined by Or Rev Stat, Sec 34.040 (App-65).

3. LAWS APPLICABLE

Laws pertinent herein are:

U S Const Art I, Sec 10(1), titles of nobility and contracts clauses;

U S Const Amend 1, religion and redress of grievances clauses;

U S Const Amend 7, trial by jury;

U S Const Amend 14, Sec 1, due process and equal protection clauses;

Or Const Art I, Sec 17, trial by jury;
Or Const Art VII (Amended), Sec 3, trial by jury;

Or Rev State, Sec 34.040;

Or Rules of Civ Proc, Rule 19, responsive pleadings;

Or Rules of Civ Proc, Rule 69, default orders and judgments.

Their text is in Appendix, at App-63.

4. STATEMENT OF CASE

"**Civic**": Within governmental concern and control. "**Civic law**": Law concerning civic matters, created by any governmental branch. "**Civic agent**": One who implements civic law, under civic law. "**Contract law**": Law concerning recognition and enforcement of contracts.

"***Ecclesiastic***": Understandable only to specially qualified or interested ones.

"***Secular***": Understandable by ones with only competence and interests basic to constituents of the state.

Kouno sued Oregon State University ("OSU") purely in its private academic capacity as university, and his teachers at OSU purely in their private academic individual and private academic representative capacities as teacher at OSU, and

only them, only in contract or in tort arising in contract, for their formally academic conduct with Kouno culminating in their dismissal of him from OSU, and prayed only for damages and his reinstatement at OSU. An exact copy of the first amended complaint and the second and final amended complaint is in Appendix, at App-15 and App-43, respectively.

Article I, Section 17, and Article VII (amended), Section 3, of the Oregon Constitution guaranteed jury trial with respect to some courses of court proceedings.

The Oregon State Board of Higher Education ("OSBHE") and lawyers from the state Department of Justice appeared in the defendants' behalf, and, acknowledging the purely schoolish substance of the law suit and the capacities wherein the defendants were sued, moved to dismiss the complaint for lack of plainness and

conciseness, for lack of jurisdiction over persons, and for failure to state facts constituting a claim, pleading only the defendants' state sovereign administrative or quasi-judicial privileges or immunities. An exact copy of their appellate brief (their only appellate paper), in all its parts pertinent to the indicating of this civic law theory of theirs is at App-57.

Also, the defendants moved to dismiss the tort claims as not timely under *Sanok v. Grimes*, 306 Or 259, 760 P2d 228 (1988), the action having been commenced not within one year of its dismissal by a federal district court for lack of jurisdiction, but within one year of the federal appeals court's affirmance of the dismissal.

The state trial court dismissed the tort claims as not timely under *Sanok*, and ordered Kouno to amend his complaint,

striking the tort claims.

In the amended complaint (App-15) Kouno alleged in contract claims, the defendants' deliberate actions contrarily to the contract against Kouno's interest, with intent categorically to escape from their contract obligations knowingly of their existence, disregarding dire effects of their conduct to him, which allegations he had made in the tort claims, and prayed for his reinstatement at OSU and for economic, noneconomic and punitive damages. On their civic law theory the defendants moved to dismiss with prejudice the complaint for lack of plainness and conciseness, for failure to allege that all conditions precedent to the defendants' performance had been met, and for failure to state facts constituting a claim. The court requested the defendants to make their contentions more specific. The defendants' response and

Kouno's reply are at App-37 and App-40 respectively. The court sustained the defendants and, indicating on a copy of the dismissed complaint what Kouno was to strike and how he was to fashion the language, ordered Kouno to amend his complaint.

In the 2nd amended complaint (App-43) Kouno alleged that the defendants dismissed him from the university not on cause and not in manner just under the contract, with intent categorically to escape from their contract obligations knowingly of their existence, disregarding dire effects of their conduct to him, and prayed similarly as before. Reiterating their civic law defense precisely as before, the defendants moved for a summary judgment. To their Motion was attached an afidavit of defendant Calvin to the effect that the defendants had acted in their formally academic conduct

with Kouno and their decision against Kouno was unanimous, and school records pertinent in the dispute.

Kouno moved to add as defendants OSBHE and its members in their individual and official capacities, and state lawyers in their individual and official capacities, (Trial Court Records 62 & 63), arguing as follows: Under color of state civic law and without due process of law, the intervenors interfered with Kouno's liberty and property rights in his contractual relationship with the defendants. U S Const Amend 1, Amend 14; 42 USC 1983; *Wood v. Strickland*, 420 U S 308, 95 S Ct 992, 43 L Ed 2d 214 (1979).

Kouno also notified the court of his intention to submit a motion for a summary judgment in his favor, intimating to the court his argument which was substantially same as herein (TCR 59: Resp to Mot for Summ Judg, at 19-20).

Before Kouno could file his summary judgment motion, the court sustained the defendants, invoking civic law *and* deeming the claim to be *ecclesiastic*, and, without the defendants ever appearing in the capacities wherein they were sued, dismissed the action for failure to state claim, denying as moot the motion to add as defendants. An exact and complete copy of the court opinion is at App-8.

Kouno had pleaded, and now pleaded, that the litigated matters were not *ecclesiastic* but *secular*, but to no avail. An exact copy of these pleadings are at App-50.

Kouno appealed, on following points: (1) In its placing, on the urging of the intervenors, the defendants under color of state civic law and beyond the reach of the contract claim, the dismissal of the action is contrary to the religion, due process, equal protection ~~and the~~

and the title of nobility clauses of the U.S. Constitution. (2) The allegations in the tort claims constitute as well contract claims. (3) The tort claims are timely under *Sanok*. (4) The motion to add the intervenors as defendants must be allowed. The defendants and the intervenors reiterated their civic law theory (see App-57) precisely as before. The state court of appeals affirmed without opinion.

The state supreme court denied review.

Noting that he had not particularly advised the appellate courts of the *secular* pleadings of his, in a petition for reconsideration Kouno called the supreme court's attention to them, submitting their exact copy which was as at App-50, except that herein the paragraph at App-51 through 52 was added. In the same petition Kouno indicated also all the

duties discussed herein of the state court and the state supreme court. The supreme court denied the petition.

6. TIME OF RAISING FEDERAL QUESTIONS

Kouno does not have any federal question in this contract action to raise against the defendants. He need not respond to any question which the intervenor state agencies have raised, since he did not call them into court and they are not legitimately in court. Kouno raises the federal questions herein, against the Justices of the state supreme court and the supreme court.

It is not a prerequisite to a mandamus action against a public body to have the body seasonably perform its constitutional or statutory duties, to have petitioned the body to perform the duties. *State ex rel. Castillo v. New Mexico Tax Commission*, 79 N M 357, 443 P 2d 850 (1968).

Where a public body (or anybody) has deprived one's rights, it is not a prerequisite to the one's action to restore the rights, for him to have indicated to the offender the illegality of its act. It is sufficient if the one has maintained his legs on which to sue. *Taboada v. Sociedad Espanola de Beneficencia Mutua*, 191 Cal 187, 251 P 673 (1923). Kouno never ceased to demand the state court to entertain his action in the terms in which he placed it. This is sufficient for the goodness of this petition.

But, Kouno rasied with the state court the federal questions herein, as follow:

Trial Court Rec 17, Mem in Supp of Opp to Mot to Dismiss/Strike.

No arrangement between the state university teacher and the state can confer on the latter the privileges and im-

munities of the former. U S Const Amend 1, Amend 14; *Keyshian v. Board of Regents of U. of St. of N.Y.*, 385 U S 589, 603, 87 S Ct 675 (1967); *Sweezy v. State of New Hampshire*, 354 U S 234, 250, 77 S Ct 1203, 1 L Ed 2d 1311 (1957). (pp. 11-12).

TCR 59, Resp to Mot for Summ Judg.

Public bodies may not be involved in the teaching aspect of higher education or in any glorification of higher education. U S Const Amend 1. (p. 5).

The state may not confer academic degrees (To the extent that OSBHE does so, OSBHE is not a state agency). U S Const Art I, Sec 10(1), titles of nobility clause; U S Const Amend 1. (pp. 5-6).

There is no civic meaning in academic degrees. U S Const Art I, Sec 10(1), titles of nobility clause. (p. 6).

The state may not privilege any class of private persons, fashioning it-

self as its dependency. U S Const Art I, Sec 10(1), title of nobility clause; U S Const Amend 14. (p. 14).

TCR 62, Mem in Supp of Mot to Join.

The intervenors are liable, because they interfered under the color of state civic law with Kouno's liberty and property rights in his contractual relationship with the defendants. U S Const Amend 1, Amend 14. *Wood v. Strickland*, 420 U S 308, 95 S Ct 992, 43 L Ed 2d 214 (1975). (pp. 5-6).

TCR 66, ORCP 62B Objections.

The state may not privilege the state university teachers in their academic freedom, fashioning itself as their dependency. U S Const Art I, Sec 10(1), titles of nobility clause.

TCR 75, Mot to Vacate Summ Judge.

The state university teacher is not an agent of civic law. The *educational and legal system* (see App-11), if such

exists, is mere folklore. Mere folklore is not law. U S Const Amend 1, religion clause; academic freedom doctrine. (p. 10).

Mere predominance of folklore does not make the folklore a law. U S Const Amend 14, due process clause. (p. 10). Appeals Court Rec 25, Appellate Opening Brief.

The dismissal of action on the basis of civic law, on the urging of OSBHE and state lawyers, is unconstitutional. U S Const Amend 1, religion clause; U S Const Art I, Sec 10(1), titles of nobility clause; U S Const Amend 14, equal protection and due process clauses. (p. 5).

The state exists only under the Constitutions, for the people's co-operation and coprosperity only to the extent that the people constitutionally agree, and it can act only through legislations (The *educational and legal system* is not state

law). U S Const Amend 14. (p. 6).

The intervenors' assisting in court only the defendants and not Kouno is unconstitutional, and their assisting them to assume the color of state civic law interferes unconstitutionally with Kouno's liberty and property rights in his contractual relationship with them. U S Const Amend 1, Amend 14. (p. 49). Supreme Court Rec 1, Petition for Review.

The dismissal of the action on the basis of civic law, not on the basis of contract law, is unconstitutional. U S Const Amend 1, religion clause, Amend 14, due process clause; U S Const Art I, Sec 10(1), contracts clause. (pp. 3, 40).

The dismissal of the contract action without resolution of disputed and material facts relating to the contract is unconstitutional. Or Const Art I, Sec 17 and Art VII (amended), Sec 3, trial by jury. (p. 3).

The trial court's freeing the defendants from liabilities in contract for breach of a moral responsibility they had undertaken in contract, declaring the liabilities to be mere tort liabilities is unconstitutional. U S Const Art I, Sec 10(1), contracts clause. (pp. 3-4).

The state lawyers' defending the defendants [and not giving Kouno equivalent help] at all is unconstitutional. U S Const Art I, Sec 10(1), titles of nobility clause. [U S Const Amend 14, equal protection clause]. (p. 10).

University degrees and professional stations have no civic meaning. People's attaching of civic meanings to them would be mere folklore. Mere folklore is not law. U S Const Amend 1, religions clause, Amend 14, due process clause. (p. 12, n 4).

Professionals, e.g., hospital physician, are not civic agents. With mal-

practice actions against them, considerations which apply to civic agents do not apply to them. U S Const Art I, Sec 10(1), titles of nobility and contracts clauses. (p. 26, n 10).

Contract law is of the domain exclusively of the judge and the jury; it may not, in any part, be subsumed in civic law. U S Const Art I, Sec 10(1), contracts clause. (p. 27, n 11).

The morality of contract should define the morality of civic law. Contracts preceded civic law. They preceded state civic laws. [Contract law may not, in any part, be subsumed in civic law]. U S Const Art I, Sec 10(1), contracts clause. (p. 28, n 11).

Where the contract is a contract within the purview of the contracts clause, punitive damage in contract for breach of the moral responsibility is essential. U S Const Art I, Sec 10(1),

contracts clause. (pp. 34, 40).

The state cannot confer academic degrees; to the extent that OSBHE does so, OSBHE is a private body. U S Const Art I, Sec 10(1), titles of nobility clause. (p. 38, n 14).

In SCR 8, Petition for Reconsideration, all federal questions herein were raised in essentially identical terms.

7. REASONS FOR ALLOWANCE OF WRIT

The inaction of the Oregon supreme court is in apparent approval of previous opinions of the Oregon court of appeals in *Morrison v. U. of O. Health Sciences Center*, 685 P 2d 439 (Or App 1984), and *McBeth v. Elliot*, 601 P 2d 875 (Or App 1979), that to the state university student's actions against his teachers and university in their formally academic conduct with him apply ultimately or exclusively state statutes regulating actions against state agents or agencies in

their governmental administrative conduct. In the light of these opinions especially, the inaction is tantamount to a decision that state civic laws ultimately or exclusively control the relationship between the state university student and his teacher, in their formally academic conduct with each other. This is in conflict apparent in, among other things, the categorical autonomy of the university recognized by this Court in the academic freedom doctrine, with the religion, redress of grievances, titles of nobility, contracts, trial by jury, and the due process clauses of the U.S. Constitution.

In *Condemarin v. University Hosp.*, 775 P 2d 348 (Utah 1989), the Utah supreme court decided that, where the State of Utah has abrogated the liability of state university hospital medical professionals for negligent malpractice (which

state action the opinion writer thought unconsitutional, 775 P2d, 364) and made the hospital liable in their stead, the state's limiting the hospital's liability is void under due course of law, uniform application of law, and civil trial by jury provisions of the Utah Constitution.

Utah Const Art I, Sec 11.

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party. [757 P 2d, 352, n 4].

Utah Const Art I, Sec 24.

> "All laws of a general nature shall have uniform application." [775 P 2d, 352].

The Utah supreme court decided, implicitly under the earlier indicated U.S. constitutional provisions, in effect, (1)

the relationship between a professional and his client is private contractual and not civic, even where the creation of the contract was mediated by the state, and (2) the state court has a duty specially to find the client's action against the professional as arising in contract, where the creation of the contract or of its terms was mediated by the state.

> We are convinced that [deference, in equal protection analysis, to legislative discrimination of a class of citizens which class is not a suspect class] is inappropriate when dealing with *the fundamental principle of American law* that victims of wrongful or negligent acts should be compensated to the extent that they have been harmed. [775 P 2d, at 352, emphasis by Kouno].

Accord Kansas Malpractice Victims v. Bell, 757 P 2d 251 (Kan 1985), reaching parallel conclusions through question of the state's capping of medical malpractice liability and of its prescribing of

the mode of compensation. Thus, the inaction of the Oregon supreme court, on one hand, and the Utah and Kansas supreme court decisions, on the other, conflict with each other, in the courts' constructions of the indicated U.S. Constitutional provisions.

Thus, the Oregon supreme court decided questions of federal law in a way inconsistent with a doctrine established by this Court and in conflict with decisions of other state supreme courts.

The answers to the questions are those which this Court, under the U.S. Constitution, must issue in an occasion such as that presented by this petition.

The answers are important for the greater fruitfulness of professional-client relationships, especially of those in state-created institutions, and particularly of the state university teacher-student relationships, and for the great-

er fruitfulness of the courts as the arbiter for conflicts arising in these relationships. (Lawyering is a job, not a profession. The law school is not a university in the sense herein).

Because of the great importance of the notion of higher education and of the notion of professions in all transactions and intercourses in the society today, the answers are important for people's notion of their places and roles in the society and for their and the society's rational and efficient functioning.

For above reasons, this Court should issue the answers and settle the questions.

8. ARGUMENT

(1) Teacher-Student Relationship

In his formally academic conduct with his student the state university teacher is, under the 1st Amendment to the U.S. Constitution (ultimately under

the religion clause), beyond the pale of state civic law. Aacademic freedom doctrine: *Regents of University of Michigan v. Ewing*, 474 US 214, 226, n 12, 106 S Ct 507, 88 L Ed 2d 523 (1985); *Regents of University of California v. Bakke*, 438 US 265, 312-13, 98 S Ct 2733, 57 L Ed 2d 750 (1978); *Durham v. Parks*, 564 F Supp 244, 250 (4d Minn 1983).

The academic conduct of state universities is controlled by state regulations originating in the Buckley Amendment, 20 USC Sec 1232g, and potentially by other constitutionally sound state regulations. But, as the related special quid pro quo indicates, the regulations regulate the conduct as conduct especially private to the university, and does not reflect any state-agencyship of the university in it. Obviously, and as indicated by the university's publishing of the regulations as school rules, the reg-

ulations operate as terms of a private agreement between the university and the student. (The regulations are enforceable at the student's option as state regulations through actions statutorily prescribed against the university as a state agency for purposes of their enforcement. But, the student has little reason to opt for such an action, because the student, as such, or the university teacher, as such, is not a civic entity, and the university's breach of the regulations is harmful to the student not because they are state regulations, but because they are terms of the agreement).

Thus, in his formally academic conduct with his student, the state university teacher does not act under color of state civic law; he is a person acting purely on his sovereign private scholarly conviction or integrity, and his relationship with his student is purely pri-

vate-contractual. This Court has already expressed its doubts to this effect in *Ewing*, in note 12, saying that the state university teachers' academic freedom and their freedom under color of state civic law from prosecution by their student are inconsistent.

Life forms in state parks, for whose autonomous interactions with each other benefitial to the state the state maintains the parks, are neither remarkable nor agents of anybody.

(2) Due Process State Agency

The state gives the state university teacher the opportunity for his teachership. Therefore, under the religion and the titles of nobility clauses, there must inhere in the state university teacher-student contract *secular* elements. Thus, the state university teacher acts under the state's color of state contract law. Therefore, under the due

process clause, the state must supply the student due process of contract law against the teacher's *secular* wrongs in his formally academic conduct with him.

Obviously, the teacher, the university, or the state agency managing the university is not the body to supply the student the due process (conflict of interests, inappropriateness of party). Obviously, the state court, and only it, is such a body.

State university students' actions against the state university in a schoolish dispute, on civic law theories are not real in their significance. Courts should not entertain such actions for mere technical or theoretical justice. This Court's entertaining such actions, e.g., *Ewing, supra*, *Bakke, supra*, and *Board of Curators of University of Missouri v. Horowitz*, 435 U S 78, 98 S Ct 948, 55 L Ed 2d 124 (1978), the Court

even suggesting that state-supported professional schools share in the people's governmental function of promoting professionalism or that universities operate for civic purposes, see, *Ewing*, 474 U S, 228, n 14, *Horowitz*, 435 U S, 91, n 6, and *Bakke*, 438 U S, 314 et seq. (Kouno speaking, the law school is not a university in the sense herein), rather than keeping themselves within their purely academic authority, and keeping themselves within their purely academic duties only to themselves and to their students, tend to confuse state university teachers and students as to the distinction between private significances and civic significances (there is none) of their schoolish roles and to obliterate the distinction. In the context of the academic freedom doctrine, these opinions of this Court, as admitted by this Court as above in note 12, *Ewing*, would permit

and perhaps even engender politically originating injustices against the student in the state university teacher-student relationship. This, *see Keyshian*, 385 U S, 603 ("pall of orthodoxy"), similarly to state control of the teaching aspect of higher education, and just as much as it, leads to suppression of free exchange of ideas in state universities and, *id.*, a stagnation and death of civilization in this society.

Because of the great importance of the notion of higher education in all transactions and intercourses in the society today, the confusion and lawlessness in the state university leads to a similar confusion and lawlessness among the general population, whereby both civism and private civility (starting with the professional's civility with his client) disappear from the society. This, more than the state university situa-

tion's undermining of true scholarship and professional competence, leads to general and chronic societal dysfunction and to widespread crimes and physical violence. More notable signs today of this process are not unexpectedly in the arenas of basic education and socialization of youth.

For the above reasons, the opinions of this Court should be immediately and explicitly clarified.

(3) Contract Claims

In its essential part the contract alleged at bar binds the defendants only to act with their (sovereign private) conviction or integrity in Kouno's behalf. Only such can the contract be, for, in the crux of the contract, the teacher cannot promise the student to ultimately do, deliver or achieve any specific thing. Contracts of this type within the purview of the contracts

clause, or *secular* contracts of this type, are possible, as reflected in statutes requiring professionals to take an oath of professionalism. *See Hughes v. Reed*, 46 F 2d 435, 436 hn 12 (10th Cir 1931).

Contracts of the above type have been discussed in recent opinions of California and Montana supreme courts: *Daniels v. Dean*, 833 P 2d 1078 (Mont 1992); *Keller v. Dooling*, 813 P 2d 437 (Mont 1991); *Story v. City of Bozeman*, 791 P 2d 767 (Mont 1990); *Weinberg v. Farmers State Bank of Worden*, 752 P 2d 719 (Mont 1988); *Nicholson v. United Pacific Ins. Co.*, 710 P2d 1342 (Mont 1985); *Seaman's Direct Buying Serv. v. Standard Oil*, 686 P 2d 1159 (Cal 1984); *Egan v. Mutual of Omaha Ins. Co.*, 620 P 2d 141 (Cal 1979), in which opinions this-type contract, or that part of the contract which part corresponds to this-type contract and is

secularly inherent in the contract, *Story*, 791 P 2d, 767, hn 5; *Seaman's*, 686 P 2d, 1159, hn 8, are denominated as *covenant of good faith and fair dealing* ("covenant"), in distinction to that part ("*contract*") of the contract which part designates specific things to be done, delivered or achieved, and only which part have come to be often denoted by the word *contract*.

Breach of covenant is breach of contract. *Story*, 768 P 2d, 767, hn 5; *Seaman's*, 686 P 2d, at 1166.

From the above and other court opinions it inexorably emerges that a breach of covenant exists where, and only where, the covenant is *secular*, the contract offense is deliberate, and it is with intent categorically to escape, in an actual or imagined absence of impediments, contract obligations, knowingly, or under contract law constructably know-

ingly, of their existence, *Story*, 791 P 2d, 767, hn 8; *Seaman's*, 686 P 2d, 1159, hns 9 & 10, or it is in knowing disregard, or under contract law constructably in knowing disregard, of some dire effects of it to the nonbreaching party. *Weinberg*, 752 P 2d, 720, hn 19; *Seaman's*, 686 P 2d, at 1174 (concurring opinion).

Tort-type damages (herein meaning noneconomic and punitive) in contract apply to breach of covenant. See, *Keller*, 813 P 2d 437; *Story*, 768 P 2d, at 776; *Weinberg*, 752 P 2d, 721, hn 20; *Nicholson*, 710 P 2d, 1343, hn 3, and *Seaman's*, 686 P 2d, 1159, hns 9 & 10.

Breach of covenant is litigable as tort at the plaintiff's option. *Story*, 768 P 2d, 768, hn 10; *Nicholson*, 710 P 2d, 1343, hn 3; *Seaman's*, 686 P 2d, 1159, hn 9.

The Montana supreme court recognizes that a covenant *secularly* inheres in ev-

ery contract, and, *see, Keller*, definitely approves tort-type damages in contract for breach of covenant. But, the court recognizes covenant breach in this sense only with contracts in statutorily regulated commercial relationships or in *special relationships*, i.e., *see Story*, 792 P 2d, 768, hn 12, relationships, in the contract in which relationships inhere greatly unequal vulnerabilities and bargaining powers of the parties with respect to the other's contract breach, e.g., the university-student relationship. This is illogical; if a covenant *secularly* inheres in every contract, it can be breached in the indicated sense in every contract. The postulation of a *special relationship* is redundant, for, inherently, the nonbreaching party is greatly more vulnerable in the contract than the covenant breacher at his wrongdoing and at a great disadvantage in the

contract in bargaining power with him. Differences between cases are merely differences between the greatnesses or their obviousnesses.

The Montana supreme court thus errs as it confuses unequal bargaining powers in contract with unequal bargaining powers in the formation of contract, which unequality is not relevant to discussions of contract breach.

With contracts not in a statutorily regulated or *special* relationship, the court allows only economic damage (which actually does not apply to the part of the contract breach which part constitutes breach of covenant) for breach of covenant, sometimes, as in *Daniels*, not so mootly. This is illogical, and, if indeed practiced, would be inimical to the due process clause or to the contracts clause depending on the actuality of the covenant or on the actuality of

the breach.

The court thus errs as it confuses breach of implied or constructive *contract* with breach of covenant and as it somewhat theorizes covenant breach in merely negligent obliviousness to the covenant. This theory, one would think, is what is at the heart of the contracts clause prohibition.

Courts tend to award tort-type damages for breach of covenant only as for tort, mindfully of state statutes permitting punitive damage with actions not in contract. *See Nicholson*, 710 P 2d, 1348, hn 3, and *see Seaman's*, 686 P 2d, 1167, and *Egan*, 620 P 2d, 146. But, the contract being a private affair, contract law is not subsumable in civic law (Statutes of fraud need not, and perhaps should not, be classified as civic law), but is of the domain exclusively of the judge and the jury. U S Const Art I, Sec

10(1), contracts clause. This, no doubt, is the only meaning of the statutes' limiting their scope to actions not in contract.

A contract is *secular*, if, and only if, the value, feasibility and the enforceability of the considerations are *secular*.

A contract offense is only a tort and not a breach of contract, if, and only if, it is due only to negligence, the offender had not concretely deplored the specific offense mechanism, and the offender cannot be made within the contract to undo the offense.

Only the *contract* and not the covenant is offended, if, and only if, the contract offense arises from a mere failure of the offender's mind, be it a deliberate mind, in the contract, and not from a wrongness of his heart, in the same.

Whether a breach of covenant is a breach of contract or a tort is not a question of the kind of the contract, of the breach, or of the damage, but of the law, either contract law or tort (civic) law, by which one measures the offense.

In its substance the university student-teacher contract is a pure covenant of good faith and fair dealing. Therefore, the student's claim of the teacher's breach of the contract, i.e., of the covenant, i.e., purely of the covenant, would not consist of an allegation of failure to do, deliver or achieve any predesignated thing. It would contain only an allegation of the covenant (which should be *secular*), an allegation of events or conduct of the teacher contrary to the student's interest, which events or conduct is within the coverage of the covenant, and an allegation that to the events or in the conduct the teacher

breached the covenant. The rest is a matter of evidence. In this, pleading bad faith with breach of a contract which is purely a covenant of good faith and fair dealing parallels pleading bad faith in tort actions and differs from pleading bad faith with breach of an other-type contract.

The covenant is the law of the case. The onus is on the teacher colorably to show his good faith and fairness of dealing under it. *See Taboada*. Under the state university covenant, the teacher's good faith and fairness of dealing must be *secular* to the jury. U S Const Amend 1, religion clause.

Thus, the principal claim of Kouno and the claims dismissed as tort claims are contract claims, the allegations therein are sufficient, and the prayers for the tort-type damages are appropriate.

In Oregon, a complaint is sufficient if it conveys facts constituting the claim. *Davis v. Tyee Industries Inc.*, 668 P 2d 1186, 1195 (Or 1983).

In Oregon, insufficiency of pleading is subject only to the defendants' motion to strike or to make more definite and certain. *Id.* Entangled in their civic law theory, the defendants did not enter any such motion. If their vague complaints about Kouno's pleadings constitute such a motion, the trial court, sustaining their civic law theory, did not make any ruling on it.

The position taken by the defendants in this law suit is tantamount to an admission, see argument 5, that the alleged pure covenant contract existed, and to a confession that the defendants violated it. Kouno should be allowed to amend the complaint to conform to the evidence which the defendants' pleadings consti-

tute.

The *contract* part of the contract, e.g., evalution by the thesis committee, while relatable to the issue of good faith and fairness of dealing, hardly requires discussion.

(4) Dismissal of Action

To Kouno is due what was promised to him, for which he dearly paid, not what false civic law may say he should take.

The quasi-judicial immunity defense (unanimity of teachers makes OSU decision final) depends on a sovereignity of OSU over Kouno independent of his recognition of it. OSU being a state university, the sovereignity must be the state's. To OSU it may be of an entity greater than the state. But, that entity would be a total nullity in court. Thus, the defendants presented only sovereign immunity defenses. Thus, they did not appear in the contract action.

Thus, on the urging of impertinent parties, the state court dismissed the contract action on its own motion and without cause, in effect refusing to take jurisdiction over it, in misapprehension purely of law, inimically to the U. S. constitutional provisions enumerated at page (1). Therefore, this mandamus petition is proper and grantable.

The jury, i.e., a panel of private persons contemplating private matters disputed at bar, pronounces the facts and the law of the case with respect to such matters, and the judge, i.e., a civic agent, merely screens cases for the jury and procedurally guides it with respect to such matters. In this jurisdiction all people have private aspects to them, and all litigants present private aspects of theirs to the court. This explains the sacred position in the federal and state Constitutions, U S Const Amend 7,

common law trial by jury; Or Const Art VII (amended), Sec 3, civl trial at law by jury, occupied by trial by jury.

The contract is a purely private affair, and contract law is of the domain exclusively of the judge and the jury. Thus, especially with contract actions, the jury is not a mere aid for the judge or a mere rein on him; with contract actions, the jury is ultimately the only source of law and justice, and is especially indispensable either in the federal or state court. *See, Britton v. Farmers Ins. Group*, 721 P 2d 303, 305, hn 23 (Mont 1986). Thus, if, under the contracts clause, it is lawful for states not to provide jury trial, in states which do not provide jury trial, especially contract plaintiffs may resort to the federal court as a matter of their federal right.

With actions presented as arising in

contract, before it can resort to state civic law for its decision, the state court must eliminate all possibilities of contract law's pertinence. At the stage of litigation in the case at bar, wherein the state court made its pure civic law decision, no question of contract law could have been decided against Kouno except by a jury. Therefore, jury trial was unconstitutionally withheld. U S Const contracts, trial by jury, and due process clauses.

The complaints do not indicate that the schoolish grievances of Kouno are *ecclesiastic*. They indicate, especially in the claims successfully sought by the defendants to be stricken as tort claims, that they are *secular* and also substantial.

Where uncertain, claims submitted to the *secular* court should be deemed to convey *secular* matters.

Kouno showed in his pleadings (App-50) his discrimination between the *secular* and the *ecclesiastic*, and indicated that his claims are *secular*.

The due process clause requires the state agency to protect its client's rights from itself even if he does not fiercely or ably fight with it for them. *See Taboada*. As the due process state agency acting in the stead of the university, the state court must construe the student's pleadings especially in his favor, especially where the student plaintiff, more likely than not economically yet struggling, is lay pro se.

In their trial court briefs, similarly as in their appellate brief (App-57), the defendants maintain essentially that they acted as state civic agents and that the disputed matters, whatever they are, are, being under their jurisdiction, *ecclesiastic*. But, this argument is log-

ically or factually inconsistent internally; *ecclesiasticness* is not a creation of civic law, and conduct of civic bodies cannot be *ecclesiastic*.

The *ecclesiasticness*, if supposed to have been raised by the defendants in their alleged civic capacity in behalf of themselves in the capacities wherein they were sued, would be impermissibly inconsistent factually with their general denial in their alleged civic capacity, as discussed in argument 5, below. If the defendants thus raised it, Kouno would have objected.

The ecclesiasticness, if supposed to have been raised by the defendants in the capacities wherein they were sued, requires allegations of facts adequate to support it.

The affidavit of defendant Lyle D. Calvin, alluded in the defendants' appellate brief (at App-60) conveys substan-

tially only that the defendants acted in their formally academic conduct with Kouno and that they decided against Kouno unanimously. But, such facts are not pertinent to the determination of the *ecclesiasticness*: In state universities, and presumably in many private universities also, the proof of causes sufficient for an academic dismissal of the student must be, under the contract, *secularly* beyond reasonable doubt. Therefore, a student dismissal on causes on whose existence or sufficiency there exist substantial disagreements between the school's academic authorities would be a *secular* wrong.[1] But, such disagreements

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[1]Consider the 50-50 split decisions of the 7 physicians to judge Horowitz's clinical performance and to determine the viability of her overall studentship, *Horowitz, supra*. Only 2 of the 7 thought that Horowitz should be dismissed. 2 of the remaining 5 even thought that she should be allowed to graduate uneventfully. Evidently, the school requested the physicians for their opinion because there was not a proof of academic causes

are not a prerequisite for the *secular* wrongness.

The affidavit conveys only the defendants' scheme and system of categorically escaping their contract obligations.

The defendants persistently claim that Kouno's satisfying to them academic requirements for the academic degree is a condition in the contract precedent to their certification of him for the degree, and demand Kouno to allege and prove that he has satisfied that condition (see App-61). But, such matters are *ec-*

---

sufficient for Horowitz's dismissal. Also, since the school requested them to evaluate Horowitz's studentship, the physicians are regardable as academic authorities of the school. Thus, under the contract which Horowitz might have argued, the school had no academic (*ecclesiastic*) cause for her dismissal. It is clear from other aspects of the case that the school's system of determining Horowitz's fate was *ecclesiastic* in a way not permissible in a state university and that in its substance Horowitz's grievance was altogether *secular*.

clesiastic and litigable neither by Kouno nor the defendants (in the capacities wherein they are being sued). This demand of the defendants, rather medievally conveying that the *ecclesiasticness* is *secular* and even civic for their purposes, but, as it indeed is for all's purposes, *ecclesiastic* for Kouno's purposes, or unfairly conveying a demand of theirs in the capacities in which to appear they refuse, is the essence of the defendants' position in this law suit and of its wrongness.

(5) Default

The essence of the alleged contract is that the defendants act with their sovereign private conviction or integrity in Kouno's behalf. The defendants have averred in cout not simply that they and Kouno acted under state civic law, as one always does, but raised as a general denial defense that, as a matter of what

they claim to be law, they acted purely in state civic capacities such that they are not personally answerable to Kouno directly. This defense is tantamount to a confession that, if there was the covenant contract, the defendants not only violated it, but also would keep violating it.

The defendants cannot plead thus and plead at the same time that they satisfied the contract. A penetrating discussion of this principle as applicable under the code practice is in *Seatle Nat. Bank v. Carter*, 43 P 331 (Wash 1895). The principle apparently applies to federal court practice, as it should. *See, Koedding v. Slaughter*, 481 F Supp 1233, 1237, under "[2]" (E D Mo 1979).

In federal courts, effects of a general denial in the answer must be determined by laws of the state in which the case originated. *Hays v. Wilkinson*, 72 F

2d 201 (10th Cir 1934). In Oregon the defendants could not have joined their general denial with any affirmative defense. *Cousin v. Taylor*, 239 P 96 (Or 1925).

As a matter of law, the contract is not only possible, but is to be presumed. As a matter of fact, it exists by the defendants' admission by default. ORCP 19(c) (App-66).

The defendants, in effect, chose as their strategy unalterably to admit their faults as alleged and default while causing impertinent parties to appear in their stead and confuse issues, and must fail in that strategy, leaving as the only thing remaining to be settled the damage amounts. ORCP 69B (App-66).

On the elected defense the defendants secured decisions in state court at all its levels. Therefore, their election of the defense is res judicata to

the state court. The due process and equal protection clauses. It is so to this juryless Court, because questions of federal civic law cannot possibly arise as between the parties to this dispute in this contract which is a pure covenant of food faith and fair dealing whch covenant does not admit any civic regulation.

Whether the defendants acted culpably or, perhaps, in some legitimate legal unaccountability, is a question of fact or of law concerning not only civic but also private aspects of them, whose resolution against Kouno is, regardless of any establishable fact which may be established, beyond mere civic legal analysis and beyond the power of the judge to answer. Therefore, the question may be constitutionally resolved against Kouno only by a jury.

(6) Motion to Add as Defendants

The intervenors' participation in the law suit would have been a mere impropriety insignificant and harmless, as Kouno thinks, to Kouno, if they pleaded, not as the state, but only as friends of the defendants, for example, that the alleged offense or the true offense of the defendants is a contract offense which contract offense is only a tort and not a breach of contract. But, their attitude, the occasion, or the fact was not so, and they did not plead so.

Intervenor OSBHE members and state lawyers have averred in court that the defendants acted purely in state civic capacities. Just as with the defendants, for the intervenors' illegitimate purposes, and for Kouno's purposes with them, whether the defendants did so is a fact within the intervenors' knowledge and a matter of their averment or ratifi-

cation. Thus, the intervenors indeed caused the defendants to act as the former say the latter acted, the interveners so interfering under color of state civic law with Kouno's liberty and property rights in his contractual relationship with the defendants. Therefore, they are liable for the wrongs of the defendants jointly and severally with them. 42 USC 1983.

Also, the intervenors' aiding the defendants with the sovereign immunity defenses, especially because it was successful, constitutes interference under color of state civic law with Kouno's liberty and property rights in his contractual relationship in court with the defendants (which wrong Kouno would maintain is in gross disregard of Kouno's rights and malicious), and the intervenors are liable for damages therefor.

In note 5, at 5, of the defendants'

appellate brief, the defendants' appellate counsel, Mr. Jas. Adams, essentially affirms that the state lawyers had had no part in the conduct of the defendants at OSU. But, the state lawyers in their office ratified the conduct as conduct of the state and, by extension, as their own conduct. Impermissible repugnance of defenses.

(7) Due Process

Where, as with some alleged contracts in the realm of contracts the creation neither of which nor of whose terms is mediated by the state, it is within the direcretion of the judge to deny a *secularness* of the existence or terms of the contract, the judge's refusing as a matter of law, to admit the action as arising in contract, or the state supreme court's refusing to review such decisions of lower courts, does not offend the contracts clause.

Where, as with alleged contracts in the realm of contracts the creation of whose terms is mediated by the state, a *secular* existence and terms of the contract is to be presumed, the judge's refusal not on clearly stated and appropriate grounds, to admit the action as arising in contract, or the state supreme court's refusal, in spite of an appropriate petition, to review as the head of the state court the laws applied in the decisions of lower courts, must, under the contracts clause, trial by jury, and the due process clauses of the U. S. Constitution, be reversed.

With contracts the creation of which, even if not of whose terms, is mediated by the state, the state has an obligation specially to recognize them and to enforce them within its implicitly admitted competence. Where, as with the case at bar, the alleged contract is in

the realm of these contracts, the duties of the state court and the state supreme court are the same as with alleged contracts in the realm of contracts the creation of whose terms is mediated by the state, under the contracts, trial by jury, and the due process clauses as with such contracts, with a difference only that the due process clause is now invokable not only for the enforcement of the contracts and the trial by jury clauses, but also for the enforcement of the state's duty specially to enforce the contract.

Thus, the Oregon supreme court must not deny Kouno's petition for review with respect to any question of law raised therein. In particular, the court must not refuse to respond to the question of timeliness of the tort claims.

The tort claims, which are in substance claims of breach of covenant,

arise in contract. They are not moot, though litigable as parallel contract claims, because the law applied for the measurement of the offenses is respectively tort (civic) law and contract law. It is the litigant's privilege to speculate significances in the difference, and to choose or augument his approach.

9. PRAYERS FOR RELIEF

For above reasons the Court should grant Kouno's prayers that

(A) this Court answer the questions and mandamus the Justices of the Supreme Court of the State of Oregon, and the Supreme Court,

(1) To cause the trial court to reinstate the action of Kouno, consistently with this Court's mandate and as consistent with just rules of law.

(2) To cause the trial court to rule that the defendants' admission by default of their violations of the *contract* and

of the covenant, and their confession of their faults through their pleadings, is res judicata, Kouno is entitled to his reinstatement at OSU, and the only remaining thing to be settled is the amounts of the *contract*-type and tort-type damages, or submit the questions to the jury, consistently with this Court's mandate and as consistent with just rules of law.

(3) To cause the trial court to allow Kouno's motion to add as defendants the intervenors (OSBHE and its members in their individual and official capacities, and the Department of Justice and the state laywers in their individual and official capacities), and to rule that the intervenors are liable for the defendants' wrongs jointy and severally with them, and liable for malicious interference with Kouno's liberty and property rights in his contractual relationship in

court with the defendants, or to submit the questions to a jury, consistently with this Court's mandate and as consistent with just rules of law.

(4) To respond to Kouno's petition for review, and, in particular, to the question of timeliness of the tort claims, consistently with this Court's mandate and as consistent with just rules of law.

(B) That the Court award Kouno his costs and disbursements in this mandamus action, against the university, the teachers, OSBHE members, and the state lawyers in their private capacity jointly and severally.

(C) That the Court grant Kouno any further or other relief which it may deem just.

Respectfully submitted,

James T. Kouno, pro se.
442 N.W. 12th Street, # 11
Corvallis, Oregon 97330
TEL (503) 758-0472

IN THE SUPREME COURT
OF THE STATE OF OREGON

JAMES T. KOUNO [Pl-App], [Pet on Rev.] v. [OSBHE], KENNETH L. BEALS, COURTLAND L. SMITH, TOM E. GRIGSBY, LLOYD E. CRISP, LYLE D. CALVIN, JOHN V. BYRBE, in their indvidual and representative capacities as teachers at Oregon State University, [Defs-Resps]. [Resp on Rev].	)	Benton County Circuit Court No. CV 91-0118 CA A72947 SC S40321 ORDER ALLOWING MOTION TO INCLUDE ERRATA SHEET IN PETITION AND DENYING PETITION FOR REVIEW

Petitioner's motion to include an errata sheet in this petition for review is allowed. The court has considered the petition for review and orders that it be denied.

Dated this 24th day of August, 1993.

[Signature stamped]

WALLACE P. CARSON, JR.
CHIEF JUSTICE

IN THE SUPREME COURT
OF THE STATE OF OREGON

JAMES T. KOUNO [Pl-App], [Pet on Rev.] v. [OSBHE], KENNETH L. BEALS, COURTLAND L. SMITH, TOM E. GRIGSBY, LLOYD E. CRISP, LYLE D. CALVIN, JOHN V. BYRBE, in their indvidual and representative capacities as teachers at Oregon State University, [Defs-Resps]. [Resp on Rev].	)	Benton County Circuit Court No. CV 91-0118 CA A72947 SC S40321 ORDER GRANTING MOTION TO AMEND PETITION AND DENYING PETITION FOR RECONSIDERATION

The court has considered petitioner's motion to amend the petition for reconsideration and the petition for reconsideration. The motion is granted. The petition for reconsideration is denied.

The motion to stay issuance of appellate judgment filed in the Court of Appeals is denied as moot.

Dated this 26th day of October, 1993.

[Signature stamped]

WALLACE P. CARSON,JR.
CHIEF JUSTICE

Filed, April 28, 1993.

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

JAMES T. KOUNO	)	
	)	Benton County
Appellant,	)	Circuit Court
	)	No. CV 91-0118
v.	)	
	)	
[OSBHE], KENNETH L. BEALS, COURTLAND L. SMITH, TOM E. GRIGSBY, LLOYD E. CRISP, LYLE D. CALVIN, JOHN V. BYRBE, in their indvidual and representative capacities as teachers at Oregon State University,	)	CA A72947
Respondents.	)	

Date argued or submitted on briefs:
April 15, 1993

Before: Rossman, Presiding Judge, and De Muniz and Leeson, Judges

Attorney for Appellant: James T. Kouno, Corvallis, pro se.

Attorney for Respondents: Virginia L. Linder, Salem

AFFIRMED WITHOUT OPINION

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party(ies): Respondents

[ ] No costs allowed.
[X] Costs allowed, payable by: Appellant

APPELLATE JUDGMENT

CIRCUIT COURT OF OREGON
BENTON COUNTY

JAMES T. KOUNO	)	No. CV 91-0118
	)	
Plaintiff,	)	ORDER GRANTING
	)	MOTION FOR
v.	)	SUMMARY
	)	JUDGMENT
[OSBHE], KENNETH L.	)	
BEALS, COURTLAND L.	)	[Stamped "FILED
SMITH, TOM E.	)	NOV 29 1991
GRIGSBY, LLOYD E.	)	BENTON COUNTY
CRISP, LYLE D.	)	COURTS BY," and
CALVIN, JOHN V.	)	endorsed by
BYRNE,	)	clerk]
	)	
Defendants.	)	

This matter came before the court on October 31, 1991, on defendants' motion for summary judgment. The court reviewed the memoranda, affidavits, and argument and is fully informed of all the relevant facts. The court finds that there is no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law. The court made express findings in its letter opinion dated November 4, 1991, and that opinion is incorporated by reference herein.

The court directs that final judment be entered in favor of defendants and against plaintiff. Now, therefore,

It is HEREBY ORDERED that defendants' motion for summary judgment against plaintiff is allowed.

Dated this 27[th] day of November, 1991.

[signed]

Honorable Robert S. Gardner
Circuit Court Judge

CIRCUIT COURT OF OREGON
TWENTY-FIRST JUDICIAL DISTRICT
BENTON AND LINN COUNTIES

Robert S. Gardner
Circuit Judge
P.O. Box 1870
Corvallis, Oregon
97339

November 4, 1991

[Stamped "FILED NOV 05 1991 CIRCUIT COURT TRIAL COURT BENTON COUNTY, OREGON," and endorsed by clerk]

Mr. James T. Kouno
[Obsolete address deleted]

Mr. Martin Dolan
Assistant Attorney General
450 Justice Building
Salem Or 97310

Re: KOUNO vs. OSU, et al
case No. CV91-0118

Dear Mr. Kouno and Mr. Martin [*sic*]:

The defendant's Motion for Summary Judgment, Motion to Dismiss, and for attorney fees was heard on October 31, 1991. The plaintiff represented himself, and Martin Dolan represented the defendants.

The court will allow the defendant's Motion for Summary Judgment. Although there are some disputes about the facts,

there are no disputes about the facts which are material to the plaintiff's claims.

Basically, the plaintiff strongly disagrees with the defendants' decision to refuse to accept his thesis. He claims that they did not fairly review his writing and did other improper things in ultimately discharging him from the graduate program. But the record does not support his claims. To the contrary the record shows that he was given ample time to complete his thesis; was offered suggestions on how to improve it; and was given the option of submitting it as a paper rather than a thesis with the understanding that he would only have to sit for oral exams to get his Masters Degree. His claims were reviewed and rejected by the Department Head, the Dean of the Graduate School, the Grievance Committee (which considered the matter

twice--each time unanimously upholding the decision to terminate him from the program), and by President Byrne. There is no evidence in the record indicating that anyone else agrees with Mr. Kouno. Even after his appeals were finally rejected by President Byrne, Mr. Kouno was offered one final opportunity to have his thesis reviewed by Dr. Hall and Dr. Neumann for possible readmission to the graduate program. Mr. Kouno refused.

This court has been very patient with Mr. Kouno because it is obvious that he comes from a different language and cultural background. The court wanted to give him the opportunity to plead his best case to see if, in fact, he had a case. I believe he genuinely feels that his thesis was excellent and important. Not being a scientist or anthropologist, I am in no position to agree or disagree. But the critically important fact in this

case is that the decision about the quality of a graduate thesis is one to be made by the faculty, who have the expertise in those areas. The faculty is not obligated to provide lengthy critiques or lengthy suggestions so long as they give the student a fair opportunity to do his or her research and writing.

It could possibly be that all the faculty was wrong about the quality of Mr. Kouno's thesis, but under our educational and legal system, that is their decision to make. If a graduate student disagrees, he or she has a grievance process, and if that is not successful he or she can try to convince another university that their work has quality and is important.

This court is not deciding whether Mr. Kouno's thesis was excellent, mediocre, or poor. This court is deciding that the faculty of a university has some

discretion in deciding whether to accept or reject a thesis and whether to terminate a graduate student from the program. Mr. Kouno took his grievance from these faculty decisions and lost. On this record, he has no further legal remedies.

The State also argues that Mr. Kouno does not have a right to bring a court action as a matter of law because he failed to file an administrative appeal from the final decision to terminate him from the program. The State is probably correct, but in view of my decision on the merits, there is no need to decide this issue.

The State request attorneys fees and argues that Mr. Kouno has brought this legal action (and the previous one in Federal Court) in bad faith, wantonly or solely for oppressive reasons. I agree that the suit is groundless. But I also find that Mr. Kouno genuinely feels that

he was wronged and that he genuinely feels that the university's action damaged his profssional career. Also, I find that his difficulties with the English language and legal processes have made it difficult for him to understand that he does not have a legal claim. Mr. Kouno obviously tries hard to prepare his court documents. He is always polite in court and generally relies on his briefs for argument. On the other hand, the defendant has had to expend attorney fees and other costs. If this court could do so, it would bring this litigation to a permanent and positive end, but Mr. Kouno will probably appeal. In any event, the Court declines to award attorneys fees. Mr. Dolan should, however, submit a claim for attorneys fees so that in the event the Court of Appeals disagrees with my decision it can order Mr. Kouno to pay the fees. Mr. Kouno now knows that he

does not have any legal claims in this matter.

Mr. Dolan to submity the appropriate order and judgment.

Mr. Kouno's remaining motions will not have to be decided because the Court is granting the defendant's Motion for Summary Judgment.

Very truly yours,

[Signed]
Robert S. Gardner
Circuit Judge

James T. Kouno, Plaintiff Pro Se
[obsolete address deleted]

IN THE CIRCUIT COURT
FOR THE STATE OF OREGON
FOR THE COUNTY OF BENTON

JAMES T. KOUNO	)	No. 91-0118
	)	
Plaintiff	)	First Amended
	)	Complaint
v.	)	
	)	Against All Defen-
Oregon State Uni-	)	dants, Breach of
versity,	)	Academic Contract:
Represented by	)	
Oregon State	)	(1) Refusal to
Board of Higher	)	perform.
Education,	)	(2) Refusal to
	)	perform,
and	)	under color
Kenneth L. Beals,	)	of academic
Courtland L. Smith,	)	authority.
Tom E. Grigsby,	)	(3) Libel, " .
Lloyd E. Crisp,	)	(4) Invasion of
Lyle D. Calvin,	)	privacy, " .
John V. Byrne	)	(5) Misrepresenta-
in their individual	)	tion, " .
capacity	)	(6) Outrageous
as scholar/teacher	)	conduct, " .
at Oregon State	)	(7) Conspiracy to
University,	)	breach con-
	)	tract, " .
Defendants.	)	
	)	Against OSBHE,
	)	No Claim.

CLAIM 1

(Against all defendants)

(Breach of contract: refusal to perform)

(Breach of contract, refusal to perform, under color of academic authority)

1. Defendant Oregon State University ("OSU") is an academic-degree-issuing educational corporation. The teachers of the synonymous university located at Corvallis, Oregon, in their capacity, whether or not in good faith, as teacher at this university, are the sole members/agents of OSU; the sole business of OSU is education at this university, i.e., the transactions between the teachers and their student at this university.

2. Oregon State Board of Higher Education ("OSBHE") is an agency of the State of Oregon, which is empowered by the State (ORS 351.070, 351.060(6)) and OSU (1) to generally reign over (not rule over or be responsible for) OSU, and (2)

to symbolize OSU, or stand in for it, in suits against OSU, so that OSBHE may hear the proceedings in the court. OSBHE is a defendant in this suit only in this sense, i.e., not as itself, but symbolically as OSU.

3. At all times material herein, plaintiff, Takaoki Kouno, AKA James T. Kouno, was a graduate student under the tutelage of OSU, in Master of Arts in Interdisciplinary Studies Program ("MAIS program"), who was affiliated principally with the OSU anthropology department, having an office therein, and who had been supplied by OSU a committee consisting of 4 OSU teachers ("thesis committee") to judge Kouno's thesis, or his effort to produce such.

4. At all times material herein, there existed a tripartite contractual understanding among Kouno, OSU, and all OSU teachers who were, or were to become,

involved in Kouno's MAIS affairs ("the contract"), whereon Kouno relied, the terms of which included the following:

(1) The merit of Kouno's thesis effort was the sole academic issue for OSU's determination whether Kouno was to receive an MAIS degree.

(2) The authority to judge Kouno's thesis, or his effort to produce such, rested exclusively in the OSU thesis commitee (not the members therein individually, or the mere group of four scholars).

(3) Where the thesis committee was to make a judgment unfavorable to Kouno on his thesis, or on his effort to produce such, the committee was to state to Kouno, and enter into record, definite academic grounds supported by academic evidence, supporting its judgment.

(4) The teachers would act with their personal academic conviction or

integrity with Kouno.

(5) The teachers would bring to Kouno for his benefit the academic authority or integrity of OSU, even if it was inconsistent with their personal academic conviction or integrity.

(6) In their involvement in Kouno's school career, the teachers would not, as strangers to Kouno (i.e., as persons who exist apart from their OSU teachership, not invoking their scholarly/teacherly authority and good faith), commit torts against Kouno, and they would not, as OSU teachers (i.e., as such, invoking their authority and good faith as such), breach the contract or do against Kouno wrongs which would be torts if they committed them as strangers to him.

5. Defendant Beals, a member of the thesis committee, resigned from the committee on June 5, 1984, without OSU's or his having satisfied the terms 1-3,

above, of the contract.

6. The above conduct of Beals, an anthropology faculty member, came to the attention of Defendant Smith, the anthropology chair. Smith approved the conduct of Beals, and, as the anthropology chair, took such actions against Kouno as student that it became meaningless for Kouno to seek in Smith or in the anthropology department remedy for the conduct of Beals.

7. January 7, 1985, Defendant Calvin, Dean of the Graduate School, who was in charge of the administration of the MAIS program, removed Kouno from the roster of OSU students, without OSU's having satisfied the terms 1-3 of the contract.

8. Kouno exercised his school rule right of appeal to an academic grievance committee, which committee consisted of two teachers, Grigsby and Crisp, and a student.

9. Grigsby and Crisp upheld the action of Calvin.

10. Kouno exercised his school rule right of appeal to Byrne, OSU president.

11. Through a letter to Kouno, dated May 3, 1985, received May 7, 1985, Byrne upheld Calvin.

12. In their respective conduct, above, Beals, Smith, Calvin, Grigsby, Crisp and Byrne acted neither to uphold their personal academic conviction or integrity, nor to uphold the academic authority or integrity of OSU, but willfully, maliciously and wantonly in disregard of Kouno's interests, without reasonable or justifiable cause, whereby Kouno was generally damaged economically in the amount of $500,000,00 (five hundred thousand dollars) and noneconomically in an undisclosed amount (ORCP 18B(1)).

13. In their respective conduct, above, the above named defendants acted

ostensibly not as strangers to Kouno, but as OSU teachers in an act of upholding the contract.

14. Kouno's MAIS projecct was to bear a fruit of a practical and significant value to the general society, and was to launch Kouno into an economically rewarding career, and the above named defendants knew as they acted, as above, under color of academic authority against Kouno, that this was probable. And, said defendants interfered, as above, in the unrolling of Kouno's academic and economic career, whereby Kouno was deprived specifically of $1000,000.00 (one million dollars), at least, in life earnings.

WHEREFORE, Kouno demands the following reliefs on the following counts:

Count 1: Refusal to satisfy the terms 1-5 of the contract.

Count 2: Refusal to satisfy the terms 1-6 of the contract, under color of

academic authority, in breach of the term 6.

Injunctive Relief: OSU reinstate Kouno in the OSU MAIS program, supply Kouno a four-member thesis committee, and through its authority, and pursuant to the contract, bring Kouno's MAIS career to a regular conclusion.

Against OSU and Beals, Smith, Calvin, Grigsby, Crisp, and Byrne in their individual capacity, jointly and severally,

GENERAL ECONOMIC DAMAGE (paragraph 12 and count 1): $500,000.00 (five hundred thousand dollars);

GENERAL NONECONOMIC DAMAGE: Not disclosed herein;

SPECIAL ECONOMIC DAMAGE (paragraph 14 and count 2): $1000,000.00 (one million dollars).

Against the same defendants, severally,

PUNITIVE DAMAGE: $10,000.00 (ten thousand dollars).

CLAIM 2

(Against all defendants)

(Breach of term 6: libel, outrageous conduct)

15. Beals resigned from the thesis committee through a letter, dated June 5, 1984, which Beals issued to, and only to, the anthropology chair and faculty, and not to the members of the thesis committee ("Beals letter," hereto attached as appendix 1).

16. In said letter Beals alleged, ostensibly not as a stranger to Kouno, but squarely as an academic advisor to him and member of the thesis committee in an act of upholding the contract, the following:

(a) (Page 1, paragraphs 1, 4, and 5 of the Beals letter): An act of Kouno's thesis committee has been a decision to

terminate Kouno's MAIS thesis effort, giving Kouno an MAIS degree by resolution.

(b) (Ditto): Said decision of the committee was unanimous.

(c) (Ditto): Said decision of the committee was official.

(d) (Ditto): Kouno knew that such official decision of the committee existed.

(e) (P. 1, par. 6 - p. 2, par. 1): In a report to the thesis committee, Kouno defamed authors with whom he disagreed.

(f) (Ditto): Kouno ignored or belittled evidence in literature contradicting his theory.

(g) (P. 2, par. 2): Kouno had used threat or uncivil speech to induce the thesis committee members to approve his thesis effort.

(h) (P. 1, par. 6; p. 2, par. 4):

Kouno was uncivil or recalcitrant in academic dealings with Beals.

17. Beals' allegations, (a)-(h), above, are false.

18. In the Beals letter, Beals, ostensibly not as a stranger to Kouno, but squarely as academic advisor to him and member of thesis committee in an act of upholding the contract, disclosed the following concerning Kouno:

(a) (P. 1, par. 2): "Two (anthropology) faculty meetings" concerning Kouno, of which Kouno was not aware.

(b) (P. 1, par. 3): Kouno's frustrated academic career prior to his enrollment in the MAIS program.

(c) (P. 1, par. 3): Statements of members of Kouno's thesis committee, concerning Kouno, of which Kouno was not aware.

(d) (P. 1, par. 4): A physical stigma in Kouno's cranial bones.

(e) (P. 1, par. 5): A portion of Kouno's academic writing or an item of his educational record.

(f) (P. 1, par. 6 - p. 2, par. 1; p. 2, pars. 2, 6): Beals' unfavorable opinions on Kouno's scholarly ability and character.

19. A term of the contract prohibited the above disclosures by Beals.

20. Beals made the above allegations and disclosures neither to uphold his academic conviction or integrity, nor to uphold OSU's authority or integrity, but willfully, maliciously and wantonly in disregard of Kouno's academic interests, without reasonable or justifiable cause.

21. Through the allegations and disclosures, Beals threatened, with force as if pursuantly to the contract, Kouno's academic purpose at the university and insulted his intelligence and sensibili-

ty, and caused intense fright and humiliation in him, and continues to do so.

PRAYER FOR RELIEF appears under claim 7.

CLAIM 3

(Against all defendants)

(Breach of term 6: misrepresentation, outrageous conduct)

22. June 6, 1984, or the day after the issuance of the Beals letter, Smith issued to Kouno a letter ("Smith letter") wherein:

(a) Smith demanded that, in exchange for further aegis of the department for Kouno, Kouno accept an MAIS degree without having his thesis, or his effort to produce such, regularly judged by the committee.

(b) Smith purported that the anthropology department, in particular Beals, could not help Kouno because its faculty, including Beals, lacked knowledge in

Kouno's research topic.

(c) Smith directed Kouno to forthwith vacate his office space in the department.

23. Smith knew that Kouno did not know of the Beals letter, and Smith did not disclose to Kouno the existence or the content of the Beals letter.

24. In the making of the demands and representation, and secreting of the Beals letter from Kouno, Smith acted ostensibly not as a stranger to Kouno, but squarely as the anthropology chair in an act of upholding the contract. And, Kouno believed that Smith acted in substantial accordance with Smith's personal academic conviction or integrity, and, in Smith's own mind, not inconsistently with the integrity of OSU; Kouno vacated his office space.

25. Smith made the demands and representation to Kouno, and secreted the

Beals letter from him, neither to uphold his academic conviction or integrity, nor to uphold OSU's authority or integrity, but willfully, maliciously and wantonly in disregard of Kouno's academic interests, without reasonable or justifiable cause.

26. Through the demands and representation, Smith, in his fraudulence, threatened, with potential force as if pursuantly to the contract, Kouno's academic purpose at the university and insulted his intelligence and sensibility, and caused intense fright and humiliation in Kouno, and continues to do so.

PRAYER FOR RELIEF appears under claim 7.

CLAIM 4

(Against all defendants)

(Breach of term 6: outrageous conduct)

27. As reasons for his removing of Kouno from the roster of OSU students,

Calvin asserted to Kouno:

(a) Kouno's MAIS thesis effort was not satisfactory.

(b) Kouno had agreed with Calvin that Kouno forfeit his rights in the MAIS program unless Kouno single-handedly obtained by the end of Fall term, 1984, a teacher to substitute for Beals in the thesis committee.

28. Calvin had neither authority nor opportunity to judge Kouno's thesis effort, and Calvin knew that Kouno knew that it was so.

29. Calvin knew that there was no agreement of the sort above between Kouno and Calvin, and Calvin knew that Kouno knew that Calvin knew it.

[Allegations of ostensible capacity of Calvin, of his bad faith and malice, and of vicious effects of the act of his to Kouno, paralleling those in paragraphs

24-26, and a notice of a prayer for relief under claim 7, deleted].

CLAIM 5

(Against all defendants)

(Breach of term 6: Outrageous conduct)

33. In grievance hearing sessions, February 8 and 22, 1985, Grigsby and Crisp asserted:

(a) The merit of Kouno's thesis, or of his effort to produce such, was not in question.

(b) The fault for Kouno's predicament lay in his not having obtained a contract with Beals personally, to the effect that Beals would not withdraw his academic aegis to Kouno at will.

34. Grigsby and Crisp did not enter into record any statement of ground for their upholding of Calvin.

[Allegations of ostensible capacity of Grigsby and Crisp, of their bad faith and malice, and of vicious effects of the

act of theirs to Kouno, paralleling those in para-graphs 24-26, and a notice of a prayer for relief under claim 7, deleted].

CLAIM 6

(Against all defendants)

(Breach of term 6: Outrageous Conduct)

38. Byrne did not supply Kouno, and did not enter into record, any statement of ground for his upholding of Calvin.

[Allegations of ostensible capacity of Byrne, of his bad faith and malice, and of vicious effects of the act of his to Kouno, paralleling those in paragraphs 24-26, and a notice of a prayer for relief under claim 7, deleted].

CLAIM 7

(Against all defendants)

(Breach of term 6:

Conspiracy to breach contract)

42. Beals, Smith, Calvin, Grigsby, Crisp and Byrne acted in conscious con-

cert with each other, in the perfecting of their actions against Kouno described in claims 1-6, as ostensible final actions of OSU teachers in the upholding of the contract.

43. In their concertedness above, the above individuals acted ostensibly not as strangers to Kouno, but squarely as OSU teachers in an act of upholding the contract.

WHEREFORE, Kouno demands the following damage, on the count of breach of the term 6 of the contract, against OSU and Beals, Smith, Calvin, Grigsby, Crisp and Byrne in their academic individual capacity:

For CLAIM 2 (Beals: libel, outrageous conduct).

GENERAL NONECNOMIC DAMAGE: Not disclosed herein.

PUNITIVE DAMAGE: $10,000.00 (ten thousand dollars).

For CLAIM 3 (Smith: misrepresentation, outrageous conduct).

GENERAL NONECNOMIC DAMAGE: Not disclosed herein.

PUNITIVE DAMAGE: $10,000.00 (ten thousand dollars).

For CLAIM 4 (Calvin: outrageous conduct).

GENERAL NONECNOMIC DAMAGE: Not disclosed herein.

PUNITIVE DAMAGE: $10,000.00 (ten thousand dollars).

For CLAIM 5 (Grigsby and Crisp: outrageous conduct).

GENERAL NONECNOMIC DAMAGE: Not disclosed herein.

PUNITIVE DAMAGE: $10,000.00 (ten thousand dollars).

For CLAIM 6 (Byrne: outrageous conduct).

GENERAL NONECNOMIC DAMAGE: Not disclosed herein.

PUNITIVE DAMAGE: $10,000.00 (ten thousand dollars).

For CLAIM 7 (conspiracy).

PUNITIVE DAMAGE: $10,000.00 (ten thousand dollars).

Respectfully submitted.

[Signed]

James T. Kouno, plaintiff pro se
[Obsolete address deleted]

[CIVIC LAW ATTACK ON 1ST AM COMP]

[C.R. 45: SUPPLEMENT TO DEFENDANTS' RULE 21 MOTION]

[page 2]

A pleading is "sham" when its allegations appear false on the fact of the pleading. *Kashmir Corp. v. Nelson*, 37 Or App 887, 892 (1978). Page 1, lines 24-26, and p. 2, lines 1-3, are sham allegations that OSU is a "corporation," that its teachers are the "sole members/agents of OSU," and that the "sole business" of OSU is "transactions" between teachers and students. These statements are distortions or misstatements and are an attempt to construct a nonexistent entity on which plaintiff can build his theories. This is also true for the allegations in paragraph 2.

[The allegation of contract terms Paragraph 4(1) -(5) (App-18)] are frivolous in that they contain no allegation

that all conditions precedent were performed (*see* ORCP 20) [i.e, Kouno must allege that he had produced a thesis acceptable to the defendants (see App-61)], nor that defendants acted outside their jurisdiction or arbitrarily. *See, Tate v. North Pacific College*, 70 Or 160, 167 [140 P 745] (1914). Legally insufficient allegations may be stricken as frivolous or irrelevant. *Davis v. Tyee Industries, Inc.*, 295 Or 467 (1983). The allegations in Paragraph 4(6) [App-19] are frivolous because when a pleading merely repeats the allegations of a former pleading that has been dismissed, it may be regarded as frivolous and may be stricken by the court. *Goose Hollow v. City of Portland*, 58 Or App 722, 726 n 4 (1982). Here, the allegations of Paragraph 4(6) try to reassert the tort claims of the original complaint, and all those tort claims were dismissed previously by the court. They

are frivolous. This same analysis applies to [Count 2 of Claim 1, App-22].

The language in Paragraphs 13 and 14 is frivolous because it raises no issue in the proceeding. *See Kashmir v. Nelson*, 37 Or App 887, 892 (1978).

[The punitive damage prayer in claim 1] is frivolous because punitive damages are not available in a contract action without some type of tortious activity. Also, punitive damages are not available against these defendants. ORS 30.270(2).

Plaintiff's claim for injunctive relief, p 6, lines 5-8, is frivolous because there are no facts alleged to support the availability of this remedy. *See, Davis v. Tyee Industries, Inc.*, 295 Or 467, 482-3 n 12 (1983); *Wagner v. Savage*, 195 Or 128, 149-50 (1952).

All of the claims 2-7 are frivolous because all thse tort claims were previously dismissed. *See, supra.*

[CONTRACT LAW DEFENSE OF 1ST AM COMP]

[C.R. 46: PL'S RESP TO MOT
TO DISMISS 1ST AM COMP]

[page 1]

1. The First Amended Complaint states only breach of contract claims.

2. None of the plaintiff's allegations is frivolous;

a) OSU is a corporation substantially of the character alleged, at least for the purposes of this action.

b) OSBHE merely reigns over OSU, not rules it, and is a defendant in this suit merely as OSU and not as itself.

[C.R. 46: PL'S EXPLANATORY MEM,
RESP TO MOT TO DISMISS 1ST AM COMP]

[page 29]

The OSU teachers act not merely as their personal selves, but under and with the authority of OSU. They solicit student applicants and grant or deny academic degrees [rather, certifications toward

the degrees] in the name of OSU. The teachers come and go, but OSU stays. And, OSU does not act in the name of any other entity. Therefore, on its face, OSU is a coporation, under *Dunn v. State University*, 9 Or 357 (1881). Unless the defendants bring some facts or laws, alleging that the facts or laws disqualify OSU from corporationhood, the plaintiff need not say anything more on this matter.

[page 30]

Concerning the role of OSBHE in this suit, the plaintiff will rest on what he has said [in] paragraph 2 of the First Amended Complaint, except, perhaps, that, to the extent [that] OSU must be served with the summons, and OSBHE accepts it in OSU's behalf, OSBHE's role in suits against OSU is not so altogether symbolic.

The plaintiff need not say anything more on this matter, unless the defendants bring some facts or laws, alleging that the facts or laws show that the plaintiff's perception is incorrect.

[page 32]

OSBHE as itself is not named a defendant in the Complaint. Therefore, as far as the plaintiff is concerned, OSBHE, as itself, is not present in this suit.

[At pages 3-29, Kouno discussed opinions of Oregon courts relating to classification of contract offenses as only a tort or a breach of contract, to indicate that claims 2-7 are contract claims and that the prayers for tort-type damages are proper. This effort and similar efforts with the appellate courts culminated in the statements in argument 3 of this Petition].

James T. Kouno, Plaintiff Pro Se
[obsolete address deleted]

IN THE CIRCUIT COURT
FOR THE STATE OF OREGON
FOR THE COUNTY OF BENTON

JAMES T. KOUNO Plaintiff v. Oregon State University, Represented by Oregon State Board of Higher Education, and Kenneth L. Beals, Courtland L. Smith, Tom E. Grigsby, Lloyd E. Crisp Lyle D. Calvin John V. Byrne, in their individual and representative capacities as teacher at Oregon State University Defendants.	)	No. 91-0118 Second Amended Complaint Aggravated Breach of Academic Contract [Stamped "FILED AUG 30 1991 CIRCUIT COURT TRIAL COURT BENTON COUNTY, OREGON," and endorsed by clerk].

For his claim for relief herein, the plaintiff alleges:

1. Defendant Oregon State University ("OSU") is an academic-degree-issu-

ing educational corporation located at Corvallis, Oregon. At all times material to this complaint, the defendant OSU teachers were acting as member and representative of defendant OSU.

2. Oregon State Board of Higher Education ("OSBHE") is an agency of the State of Oregon, which is empowered by the State (ORS 351.070, 351.060(6)) to represent the so-called State System of Higher Education, including OSU.

3. At all times material to this Complaint, plaintiff Takaoki Kouno, AKA James T. Kouno, was a graduate student at OSU, in Master of Arts in Interdisciplinary Studies Program ("MAIS program"), who was affiliated principally with the OSU anthropology department, and who had been supplied by OSU a committee consisting of 4 OSU teachers ("thesis committee") to judge his thesis effort.

4. At all times material to this complaint, there existed an agreement among Kouno, OSU, and all OSU teachers who were, or were to become, involved in Kouno's MAIS affairs ("contract"), whereon Kouno relied, the terms of which included the following:

(1) Kouno's thesis effort was the sole academic issue for OSU's determining whether Kouno was to receive an MAIS degree.

(2) The authority to judge Kouno's thesis effort rested exclusively in the OSU thesis committee (not its members individually or a mere group of four scholars).

(3) Where the thesis committee was to decide unfavorably to Kouno on his thesis effort, the committee was to state to Kouno, and enter into record, definite academic grounds supported by evidence, supporting its decision.

(4) In all matters the teachers would act with their personal academic conviction or integrity, at the academic behest and authority of OSU.

5. On June 5, 1984, ostensibly for reasons of Kouno's thesis effort, Defendant Beals, an anthropology department faculty and member of the thesis committee, resigned from the committee before the committee had served its function with respect to Kouno's thesis effort.

6. On June 6, 1984, ostensibly for reasons of, or related to, Kouno's thesis effort, defendant Smith, the anthropology chair, made it impossible for Kouno's to continue his MAIS effort in the anthropology department.

7. On January 7, 1985, ostensibly for reasons of Kouno's thesis effort, defendant Calvin, Dean of the Graduate School and administrator of the MAIS pro-

gram, removed Kouno from the roster of OSU students.

8. Kouno exercised his school rule right of appeal to an academic grievance committee, which committee consisted of two teachers, Grigsby and Crisp, and a student.

9. Grigsby and Crisp upheld Calvin.

10. Kouno exercised his school rule right of appeal to Byrne, OSU president.

11. Through a letter dated May 3, 1985, to Kouno, received May 7, 1985, Byrne upheld Calvin.

12. As they acted as above, Beals, Smith, Calvin, Grigsby, Crisp and Byrne each breached terms 2, 3 and 4, in paragraph 4, above, of the contract, with ulterior motivations disregarding their academic duties as individual or as representative of OSU with Kouno, and as a matter of academic record professing le-

gitimacy of their conduct, knowingly perverting the working of the contract, whereby causing damage to Kouno, in the amount of $1,500,000.00 (one million and five hundred thousand dollars) in damage to his academic and economic careers, and in an undisclosed amount in noneconomic damages (ORCP 18B(1)).

13. Kouno has performed all the conditions he was required to perform under the contract.

WHEREFORE, Kouno demands the following relief:

(1) INJUNCTIVE RELIEF: OSU reinstate Kouno in the OSU MAIS program, supply Kouno a four-member thesis committee, and through its authority, and pursuant to the contract, bring Kouno's MAIS career to a regular conclusion.

(2) Against OSU and Beals, Smith, Calvin, Grigsby, Crisp, and Byrne in

their individual capacity, jointly and severally,

(A) ECONOMIC DAMAGE: $1,500,000.00 (One million and five hundred thousand dollars).

(B) NONECONOMIC DAMAGE: Not disclosed herein.

(C) Against the same defendants, severally,

PUNITIVE DAMAGE: $10,000.00 (ten thousand dollars) or atoning acts for Kouno equivalent to the money payment in punitive and deterrent effect.

Respectfully submitted,

[Signed]

James T. Kouno, Plaintiff pro se
[obsolete address deleted]

The defendant OSU faculty members did not merely deal to Kouno an unjust academic action on erroneous academic grounds. If this is all that they had done, and if they had done it in good faith, then, they had done little wrong. But, such is not the case.

The defendant OSU faculty members assumed pseudo-judicial authority *in disregard of academic questions*, when Kouno sought their academic attention. And, they proceeded to issue judgment for themselves and against Kouno, and to punish him pseudo-judicially *without regard to academic questions*. Thus, the defendants are incorrect in their contention #3 [that Kouno had not alleged facts indicating that the defendants acted

arbitrarily]. The defendants acted arbitrarily (1) in their assuming of the pseudo-authority, in neglect of their academic duties to Kouno, and (2) in their conduct in their speudo-authority, for their own advantage against Kouno, in disregard of Kouno's trust and reliance on them, and in exploitation of them. [Emphasis in original].

The above conduct of the defendant OSU faculty members gives rise to Kouno's contract and tort claims, because Kouno had bargained specifically against it, he did not expect it, and he was vulnerable academically and psychologically against it.

[To an objection that Kouno had not alleged his satisfaction of a condition precedent to the defendants' performance, that he satisfy all the academic requirements for the academic degree], Kouno is suing only for academic atten-

tion from OSU, not for the MAIS degree. It is not for Kouno presently to know whether he has or will have complied with all the academic requirements necessary for the degree. Under the contract between OSU and Kouno, and between OSU faculty members and Kouno, that is yet for OSU to determine and to inform him.

[C.R. 58: RESP TO MOT FOR SUMM JUDG]

[pages 17-18]

Kouno is suing the defendants in their academic capacity; he has [thus] asserted that the disputed *academic matter* was within the defendants' academic jurisdiction and authority. The issue presently is whether *their conduct* was within their academic jurisdiction or authority. The defendants[']' failure, in spite of the clarity of the issue, to claim or prove through academic record specific academic justifications for

their conduct is fatal. [Emphasis presently supplied].

[C.R. 66: ORCP 62b OBJECTION]

[pages 13-14]

Where university teachers have come to a consensus over the truth or validity of facts or ideas submitted to them by their student in the academic context, and expressed to the student clearly the grounds of their consensus, the teachers are not suable by the student for any act of theirs which the consensus entitles them to make, no matter how incorrect perceivably to the student or to academic authorities other than the teachers the consensus may be. This is so, because, if the teachers have performed as above, they have done their duty to the student, in their making of themselves vulnerable in their scholarship, through their expressing of the scholarly grounds for

their consensus, and, if other academic authorities disagree with them, the student can find remedy in those academic authorities.

The Court should not usurp the academic jurisdiction of the defendants.

However, the teachers' procedures for the justifying of their actions with their student, in particular their expressing of the grounds for the consensus of theirs, must be reasonably perceivably (not merely conceivably) to the student fair (apart from the student's actual perceiving, and apart from whether the consensus represents good scholarship). It must be so, because the object of the transactions between the teachers and the student is reason. The student is entitled to be recognized in the school as a person of reason with rights; he is entitled to know not merely the conclusion of the teachers, but also

their reasoning and the facts considered by them, so that he can disagree with them on the reasoning or facts, if he wishes. The well established judicial doctrine that the Court may overrule the teachers where their conduct with their student is arbitrary or capricious, *Connelly* [244 F Supp 156 (1965), *Gaspar* [513 F 2d 843 (1975)], *Mahavongsanan* [520 F 2d 448 (1976)], *supra*, must relate to this point. Thus, the student has power to challenge in the court the fairness of the procedures.

The court should not delegate its judicial jurisdiction to the defendants.

Kouno has not ever demanded from the defendants anything other than their clear expressing of the academic grounds for their actions against him. [Allusions to Kouno's pleadings at OSU and in the court, deleted]. The defendants have not ever responded to this demand of

Kouno. Their fault is not that they did not provide lengthy explanations, but that they did not provide any legitimate explanation.

COMBINED ARGUMENT ON ALL ASSIGNMENTS

A. The trial court lacked jurisdiction because plaintiff failed to pursue his exclusive APA remedy.

The administravie Procedures Act is the exclusive remedy for a student grievant with respect to a university order. *McBeth v. Elliot*, 42 Or App 783, 686-87, 601 P2d 871 (1979) (exclusive remedy of SOSC students seeking higher geology grades was *via* APA review, not a declaratory judgment action). Plaintiff has not sought judicial review under APA either in the circuit court or in this court. Such a request for judicial review must be filed within 60 days of the order. ORS 183.482(1); 183.484(2). A party may not sidestep the APA judicial review pro-

cedures for another remedy, because APA judicial review is the exclusive remedy. *Pen-Nor, Inc. v. Oregon Dept of Higher Ed.*, 87 Or App 305, 308-09, 742 P2d 643 (1987). *See also Bay River v. Envir. Quality Comm.*, 26 Or App 717, 720-21, 554 P2d 620 (1976) (circuit court lacks jurisdiction to review administrative agency order where the litigant is entitled to an administrative remedy and fails to exhaust it).

In this case, plaintiff has not sought judicial review under the APA. Because the trial court lacked jurisdiction over plaintiff's non-APA claims [i.e., claims not submitted to APA procedures], it should have dismissed this action for want of jurisdiction. This ground for dismissal applies to all of plaintiff's claims asserted in this action, including those [against the intervenors] sought to be added in the third

amended complaint.

[page 8]

C. Plaintiff's contract claims fail as a matter of law because plaintiff failed to complete academic requirements to the satisfaction of the faculty, the exclusive arbiter of that issue.

In *Tate v. North Pacific College*, 70 Or 160, 167, 140 P 743 (1914), the court held that a faculty determination of academic standing is a quasi-judicial proceeding. The terms of an academic contract were set forth as follows:

1) The educational institution issues a catalogue stating the requirements for a degree;

2) The student enters the institution, with knowledge of these requirements, with the intention of obtaining the degree;

3) The student agrees he or she will comply with all the requirements of the

institution, and the institution agrees it will issue the degree when the requirements are complied with. If the requirements are not fulfilled, the degree will not issue;

4) The decision of the insitituion is conclusive if it acts within its jurisdiction in good faith and not arbitrarily.

Tate held it up to the faculty to determine if a student has satisfactorily completed academic requirements. 70 Or at 164-65, 167.

In this case, the faculty of Oregon State University made a faculty determination regarding plaintiff's academic standing. (See Affidavit of Lyle Calvin; App-9). OSU is statutorily authorized by ORS 351.072(1)(a) to adopt standards and practices relating to academic advancement without having to comply with APA rulemaking provisions. OSU thus has wide

discretion to regulate academic advancement and the granting of degrees and other academic matters.

Plaintiff alleges defendant breached the "contract" set forth in Paragraph 4 of the second amended complaint. (App Br, App-27). Plaintiff alleges he performed all the conditions he was required to under the "contract." (App Br, App-29). Plaintiff also argues that his professors had a duty to teach and evaluate him fairly for his academic benefit. There is no genuine issue of material fact, however, concerning plaintiff's failure to fulfill the condition precedent that he produce an acceptable thesis. It is in fact undisputed that plaintiff did not produce a thesis acceptable to his professors. That was a condition precedent to plaintiff's continuation in the graduate program, given that plaintiff refused alternatives obviating the need for a

thesis. A contract that rests upon a condition precedent cannot be enforced until the performance of the condition. [Authorities ommitted].

[page 10]

Plaintiff's exclusive remedy in this case was through judicial review under the APA. Given *Tate v. North Pacific College, supra*, he is not entitled to other forms of review in circuit court of the faculty's academic decision to terminate him from the masters degree program at Oregon State University.

* * *

Respectfully submitted,

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[Signed]

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LAWS APPLICABLE

U S Const Art I, Sec 10(1).

No state shall * * * pass * * * law impairing the obligation of contracts, or grant any title of nobility.

U S Const Amend 1.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U S Const Amend 7.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

U S Const Amend 14, Sec 1.

* * * [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

Or Const Art I, Sec 17.

Jury trial in civil cases. In all civil cases the right of Trial by Jury shall remain inviolate.

Or Const Art VII (Amended), Sec 3.

Jury trial; re-examination of issues by Appellate Court; * * * In actions at law, where the value in controversy shall exceed $200, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this State, unless the court can affirmatively say there is no evidence to support the verdict. * * *

Or Rev Stat, Sec 34.040.

34.040. When allowed. The writ [of review] shall be allowed in all cases where the inferior court including a district court, officer or tribunal other than an agency as defined in ORS 183,310-(1) [i.e., a state administrative agency] in the exercise of judicial or quasi-judicial functions appears to have:

(1) Exceeded its jurisdiction;

(2) Failed to follow the procedure applicable to the matter before it;

(3) Made a finding or order not supported by substantial evidence in the whole record;

(4) Improperly construed the applicable law; or

(5) Rendered a decision that is unconstitutional,

to the injury of some substantial interest of the plaintiff, and not otherwise.

The fact that the right of appeal exists is no bar to the issuance of the writ.

Or Rules of Civ Proc, Rule 19, Resonsive Pleadings.

C. Effect of Failure to Deny. Allegations in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in the responsive pleading. * * *

Or Rules of Civ Proc, Rule 69, Default Orders and Judgments.

A. Entry of Order of Default. When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, the party seeking affirmative relief may apply for an order of default. [After the defendant has been given opportunity to respond to the default order

application and has failed to plead or otherwise defend], the clerk of the court shall enter the order of default.

B. Entry of Default Judgment.

B(2) *By the court.* [In all cases other than those in contract for sum certain or for a sum which can by computation be made certain], the party seeking a judgment by default shall apply to the court therefor, * * * If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such a hearing, or make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper. The court may determine the truth of any matter upon affidavits. [END]